Posting of Checks: Final Payment and the Four Legals

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A drew a check to B who deposited it in his account in X Bank. The check was presented to the drawee-payor, Y Bank, on Friday morning through the local clearing house, was sorted, encoded, run through the electronic computer, and stamped "Paid." On Monday morning exception reports were reviewed, the check was photographed, cancelled, and filed away in A's account. On Monday afternoon A stopped payment on the check. Y Bank removed the check from A's file and notified X Bank the check was being returned in accordance with the local clearing house rule. In an action by X Bank against Y Bank *held:* the Uniform Commercial Code provides that posting is not completed until the time for reversal of entries expires, and since the bank by clearing house rule could return items until Tuesday, Y Bank had not completed the process of posting, and was not accountable to X Bank for the amount of the check. *West Side Bank* v. *Marine National Exchange Bank,* 155 N.W. 2d 587, 4 UCC Rep. Ser. 1003 (Wis. 1968) (hereinafter referred to as *West Side*).

This recent holding poses in sharp outline the significance of the UCC concept of "process of posting"[1] in the law relating to payor bank liability. Where, how, and why does completion of the process of posting affect the bank's legal posture? How clear are the rules? Did the court in *West Side* apply them consistently with the policy of the Code draftsmen? Finally, ought the rules be construed and applied differently to reflect other interests and policy goals? To those questions this paper is directed.

I. Process of Posting in Context

The number of checks processed by American banks has been estimated at upwards of 17 billion annually,[2] and is increasing at a rate of seven percent a year.[3] Eventually in the lifespan of each of these items,

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1. Uniform Commercial Code, §4-109:
The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank: (*a*) verification of any signature; (*b*) ascertaining that sufficient funds are available; (*c*) affixing a "paid" or other stamp; (*d*) entering a charge or entry to a customer's account; (*e*) correcting or reversing an entry or erroneous action with respect to the item.

2. Proceedings, American Bankers Association, National Automation Conference 1966, at 471 (1967).

3. Clarke, *Check-out Time for Checks,* 21 BUS. LAW. 931, 933 (1966).

it will be presented to the bank on which it was drawn for payment. Such presentment may occur over the counter, through a local clearing house, or, as expressly permitted by the Uniform Commercial Code, by direct routing from a distant collecting bank.[4] In any event, the drawee-payor will then initiate its "process of posting" to determine the payability of the item, and to record its decision to pay.

In the halcyon days of the 1940's and early 1950's—despite an already mushrooming volume of checks to be processed—the posting was done largely by hand. Sorting, signature verification, stamping, preparation of remittances and cash letters and filing were manual processes requiring in many banks a substantial bookkeeping staff. The sheer volume of items plus wartime manpower shortages prompted the banking industry to seek legislation authorizing "deferred posting" to give them an additional period of time to process incoming checks.[5] But, by the late 1950's, significant changes in the posting process were becoming possible through the use of electronic computers to process checks bearing magnetic-ink encoded symbols. Check posting has now become largely a mechanized process, but a process whose function remains as before—to determine whether the check should be paid, and to record that payment.

The process of posting is used in the Code as a determinant of several significant legal relationships:

A. *To determine final payment.*

Completion of the process of posting is set out in §4-213(1)(d) as one of the events which constitutes "final payment" of the check.[6] Under the Code, as under the Negotiable Instruments Law, a check "does not operate as an assignment of any funds in the hands of the drawee";[7] the bank is not initially obligated to the holder. But, if the bank is to honor its customer's order, it must at some point "pay" the holder. Few "payments" by drawee-payor are effected by a transfer of cash or coin. Indeed the Code provides rather sophisticated mechanisms whereby settlement with a collecting bank can be accomplished by remittance

4. UCC §4-204(2), and Comment 3 thereto.

5. See generally, Leary, *Deferred Posting and Delaying Returns—The Current Check Collection Problem*, 62 HARV. L. REV. 905 (1949). The practice is continued under the Code, §4-301 permitting the bank to return items before its "midnight deadline." Midnight deadline is defined in §4-104(1)(h) as "midnight on its next banking day following the banking day on which it receives the relevant item. . . ."

6. UCC §4-213(1) provides:

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first: (*a*) paid the item in cash; or (*b*) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or (*c*) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or (*d*) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

7. UCC §3-409(1); NIL §189.

draft, cashier's check or by authority to charge an account of the remitting bank.[8] Thus, the prime consequence of final payment (as determined by completion of posting) is, as §4-213(1) provides, that "the payor bank shall be *accountable*[9] for the amount of the item," to the holder.

But accountability to the holder is hardly the *only* consequence of finding that posting has been completed and the check finally paid. Final payment operates to discharge all secondary parties (drawer and indorsers) from liability on the instrument;[10] it simultaneously and automatically firms up provisional interbank credits given in settlement and makes final any deposit credit given by the depositary bank to its customer;[11] should the mystical event of final payment occur and the payor bank then fail before settling for the check, the owner of the item holds a preferred claim against the payor.[12] The check owner also has a federally-insured deposit with the payor from the moment it pays the check.[13] The most prolific writer in this area, Mr. Fairfax Leary, Jr., has suggested that "[a]ny present-day legislation dealing with bank collections should, therefore, select as early a time for 'payment' as possible so as to extend this insurance protection to owners of items in process of collection."[14]

To the same extent that final payment renders the payor "accountable" to the owner of the check, it also terminates the payor's responsibility to its customer, the drawer: the payor-drawee has discharged its contractual obligation to honor properly payable items and cannot be liable for a wrongful dishonor.[15] The point is that all parties to a check, including in most cases the collecting banks, have a legitimate concern about "final payment," and this concern is heightened when the operative event—completion of the process of posting—is exclusively under the control of the payor bank itself.

B. *To determine the timeliness of the four legals.*

Prior to the Code it was possible to think of the drawee-payor bank's responsibilities with respect to a given account as fastened to a single hinge. Initially the bank owed all its duties to its customer (and, derivatively, to his creditors, trustee or executor). It could pay out funds only on the customer's order; it had to honor his requests to stop pay-

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8. UCC §4-211.
9. Comment 7 to UCC §4-213 says in part: "The term 'accountable' is used as imposing a duty to account, which duty is met if and when a settlement for the item satisfactorily clears." *Cf.* Rock Island Auction Sales, Inc. v. Empire Packing Co., Inc., 204 N.E.2d 721, 2 UCC Rep. Ser. 319 (Ill. 1965).
10. UCC §3-413 and §3-414.
11. UCC §4-213(2) and (3). The right of a collecting bank to charge back any provisional credit also terminates on final payment. UCC §4-212(1).
12. UCC §4-214(2).
13. 12 U.S.C. §§1811-1831 (1964 ed.); 12 C.F.R. §330.2 (1967).
14. Leary, *supra* note 5, at 942-43.
15. UCC §4-401 and §4-402.

ment; it could be compelled to pay over the account to an attaching creditor or trustee; and since the bank itself might be a creditor of the customer, it could set-off funds in his account against indebtedness owed to the bank. The force that swiveled the hinge in the other direction—toward the owner of the check—was the act of payment, however payment might have occurred. There was no middle ground where the bank might have ceased to be responsible in the direction of its customer but not yet accountable to the owner of the instrument.

The Code, however, follows a different tack. Where §4-213 establishes only the bank's accountability to the holder, §4-303 sets out wholly separate rules for determining whether various customer-derived legal claims can affect the bank.[16] One of the rules in that section adopts completion-of-posting as a cut-off point, and it is for that reason we examine it here.

The four principal legal events (the "four legals") to which §4-303 pertains are notice (as of insolvency or death), stop-payment order, attachment, and payor-bank set-off. As Comment 1 to §4-303 states: "Each of these events affects the account of the drawer and may eliminate or freeze all or part of whatever balance is available to pay the item." The rules of the section are stated in terms of the timeliness of the legals, so that the resultant construct is a system of priorities between checks drawn on an account and other claims to it.

Most of the priority rules of §4-303, expectedly, are identical to corresponding determinants of final payment under §4-213. Completion of the process of posting is one of these. But there are additional events in §4-303 (such as formal acceptance or certification of the item) which can bar the "legals" but which are insufficient to render the bank "accountable" to the holder. Most significant (and most troublesome) is the latter part of §4-303(1)(d) which says that the bank need not heed legals if, though it has not completed posting, it "otherwise has evidenced by examination of such indicated account and by action its decision to pay the item." The implication seems clear that the drawee bank, legally, may reach a decision to pay which would justify its refusal to honor a stop order, for example, but which would not yet constitute final payment so as to render the bank accountable to the owner of the item.

Other implications flow from a comparison of the "posting" tests in

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16. The section provides that any of four legal events "comes too late" to alter the bank's right or duty to pay an item if it occurs after the bank has done any of the following: (*a*) accepted or certified the item; (*b*) paid the item in cash; (*c*) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; (*d*) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or (*e*) become accountable for the amount of the item under subsection (1)(d) of Section 4-213 and Section 4-302 dealing with the payor bank's responsibility for late return of items.

§4-303 and §4-213. The apparent thought of the draftsmen was that a check-ower has equities superior to a Johnny-come-lately "legal" claimant, if the bank has taken steps toward paying it before the legal arrives. By their citation, in Comment 3 to §4-303, of the *Nineteenth Ward Bank* case,[17] the draftsmen appear to approve some fashion of sight-posting as sufficient, at least if coupled with some "action" by the bank.[18] At the same time, in §4-213, the Code clearly intends that final payment shall occur as early as possible in the drawee's handling of the check, for the preamble states that an item is finally paid on the happening of specified events, "whichever happens first."

What seems undeniable at this point, then, is that while there is a general premium on getting the legal consequences of drawee-handling of checks decided quickly, a drawee may have evidenced its decision to pay before posting is completed. It may be immune from legals, but not yet liable to the check owner. What are its legal obligations during that hiatus? Apparently none.[19]

II. Process of Posting—Definition

§4-109, defining "process of posting," was not added to the Code until 1962, and a lengthy attempt to trace its ancestry would prove fruitless, for several reasons. First, none of the statutory antecedents of the Code nor any consistent strain of case law defined "posting." The New York Law Revision Commission, reviewing the common law antecedents of §4-213, conceded that the New York decisions were "not precise in identifying the act of posting as the decisive act."[20] Another commentator concluded that the cases dealing with attempts by drawees to return checks through the clearing house after they have been debited to the drawer's account are "few and, for the most part, unsatisfactory."[21] Walter Malcolm, one of the Code draftsmen, summed up the various case law holdings on time of payment by suggesting "Yo pays yo money, and yo takes yo choice."[22]

More importantly, checks simply are not hand-posted by the "dribble" method any longer. Mr. Leary noted in 1949 that banks then were clearly posting checks—at least those coming through the clearing

17. Nineteenth Ward Bank v. First Nat'l Bank of South Weymouth, 184 Mass. 49, 67 N.E. 670 (1903).

18. Such a reading of §4-303(1)(d) occurred in Yandell v. White City Amusement Park, 232 F. Supp. 585, 2 UCC Rep. Ser. 205 (D. Mass. 1964). To close out its books at the end of the month, the payor hand-stamped checks and penciled notations on the accounts; the court held that the "plain meaning" of §4-303(1)(d) was that an attachment writ served the following day was too late to suspend the bank's right to charge the drawer's account.

19. The trial court in *West Side* recognized this possibility. West Side Bank v. Marine Nat'l Exch. Bank, 4 UCC Rep. Serv. 264, 273 (Cir. Ct., Milwaukee County, 1967). *Cf.* 2 N.Y.L. Rev. Com., Study of the UCC 1462 (1955).

20. 2 N.Y.L. Rev. Com., Study of the UCC 1404 (1955).

21. Andrews, *The City Clearing House: Payment, Returns, and Reimbursement,* 27 Ind. L.J. 155 (1952).

22. Malcolm, *Article 4—A Battle With Complexity,* 1952 WIS. L. REV. 263, 290 (1952).

house—in bulk,[23] and today's electronic computers, it is said, can handle a phenomenal 100,000 items per hour. Posting *a la* 1968 cannot and should not be gauged by practices or court dicta of years ago.

The Code as promulgated in 1952 contained the "process of posting" standard in both §4-213 and §4-303. Both sections were substantially re-written as a result of the New York Law Revision Commission study, but no clarification was given to the phrase. The Comments appended by the draftsmen are not very helpful beyond a few generalities to the effect that the language supposes a "tangible" measuring point. Also, says Comment 5 to §4-213, "the phrase 'completed the process of posting' is used rather than simple 'posting' because under current machine operations posting is a process and something more than simply making entries on the customer's ledger."

But how much more? Dean Andrews made a persuasive argument in 1952[24] that since posting reflected the drawee's decision to pay, and since clearing house rules or deferred posting legislation allowed drawees an extra day to return "not good" items, the drawee impliedly withheld decision to pay until the last possible moment—that is, until further inaction on its part would by law constitute payment. His argument has a defensible policy basis—that banks should have the maximum time available to determine whether they will or will not pay—but it is otherwise circular. It assumes that the establishment of a time limit for returning checks necessarily precludes the bank's becoming liable on the item before that time expires; this flows from the conclusion that the deferred posting statute or clearing house rule somehow embody an expression of intent by affected banks not to decide to pay items until the time period expires. But the deferred posting legislation, it will be recalled, was created to relieve a manpower shortage, not to evidence any bank's decision to pay. And to read such meaning into clearing house rules established by the banks themselves is a singularly effective tug at the bootstrap.

Prior to 1962 little argument could be derived from the Code itself for either an expansive or a restrictive interpretation of the phrase "process of posting." True, throughout Articles 3 and 4 runs the policy in favor of prompt handling and prompt retirement of checks and other negotiable paper, and this might suggest that it is somehow anomalous to construe "process of posting" in such a way (as suggested by Dean Andrews) as would postpone final payment. Something might also be made of the structure of §4-213 which describes four events and says that an item is paid when the bank does one of them, "whichever happens first." The four events are then set out in what appears to be their most likely chronological order: first is payment in cash, fourth is failure to revoke a provisional settlement within the time permitted. "Completed the process" of posting is third, which could be construed to

23. Leary, *supra* note 5, at 909.
24. Andrews, *supra* note 21, at 167-71.

mean that posting would usually be completed before expiration of the maximum time.

One commentator, Professor Bunn of Wisconsin, specifically asked, in 1958, whether a check could be finally paid *before* passage of the midnight deadline. He answered:

> Yes, it may. Remember that the only reason for giving the drawee time at all is to enable it to make its examination of the item. When it has concluded that examination, and evidenced in a clear way its decision to pay the item, *there is no reason to give it further time*. The way that decision is commonly evidenced is by posting the item to the drawer's account. So the Code says that when posting is completed, the item is "finally paid." (Emphasis added.)[25]

Perhaps unfortunately there were no reported cases prior to 1962 which interpreted the "process of posting" language, so any argument along these lines is inconclusive.

In 1962 the Permanent Editorial Board promulgated recommended amendments to the UCC. Among them was an entirely new section, 4-109,[26] which defined process of posting. The provision quite clearly relates posting to "the usual procedure followed by a payor bank," and recognizes that it embodies two stages: "determining to pay an item," and "recording the payment." It then sets out five specific steps which might be included in the posting process "as determined by the bank." The first four are universally conceded to be part of the posting process. Sub-section (e), however, causes difficulty when it allows as part of the posting process "correcting or reversing an entry or erroneous action with respect to an item." It is this language which the Court in *West Side* found extended posting until the expiration of the clearing house deadline.

Little legislative history for the provision is available. No reasons for the addition were offered by the Permanent Editorial Board, although a Comment was appended which offered three "examples" of what was meant.[27] §4-109 was one of three amendments to Article 4 promulgated in 1962; all three have been attributed in one way or another to predecessor New York legislation, or to recommendations of the New York Clearing House Association. It is impossible, however, to identify any specific problem intended to be resolved by the new section, other than

25. Bunn, *When is a Check Paid?*, 43 MINN. L. REV. 289, 300 (1958).

26. Report No. 1 of the Permanent Editorial Board for the UCC 25-27 (1962). The full text of §4-109 is set out in note 1, *supra*.

27. Example 1 in the Comment to §4-109 seems identical to the facts of the *West Side* case: a check is received through the Monday morning clearing; all in-bank procedures are completed with a debit to the customer's account at noon on Tuesday. The Example concludes: "The process of posting is completed at 12 noon on Tuesday." Under the rule of *West Side,* however, posting would not be completed until Tuesday midnight, or even as late as the Wednesday morning return clearing.

to "allay any doubt"[28] about what might be included in the process of posting.

Shortly, though, Mr. Leary, himself a former Reporter for Article 4, took up Dean Andrews' cudgel from 1952 and argued in the Marquette Law Journal that "completion of the process of posting would not be satisfied," for §4-213 purposes, "until the time within which entries could be reversed had expired."[29] The argument hinges solely on the language of §4-109 which included in process of posting "reversing an entry." Under normal circumstances, it is said, the payor has until the expiration of the midnight deadline to reverse entries, and it accordingly is not until then that posting is completed. From the bank's point of view the argument is enticing—even persuasive. But the Wisconsin court, in citing extensively from Leary' article, omits some of his own qualifications. He prefaced his interpretation of §4-109 with an admission that "human error, and sometimes even machine error, can creep in"[30] to the mechanical posting process. No such error was involved in *West Side*. He also conceded that the 1962 addition may not have intended to make substantive changes from prior law, but suggests that "the wording may have done so."[31]

Despite the plea of the Wisconsin court that §4-109 is "plain and unambiguous"[32] in deferring completion of posting to the expiration of the midnight deadline, alternative readings of the section *are* possible. Obviously in a mechanized posting process, mis-sorts, mis-readings, other mechanical errors, and human errors, occur. Stop-orders or other legals may be in transit from teller to bookkeeper. It is quite reasonable, therefore, for payor banks to have a period of time after the mechanical and manual processes are completed to verify action already taken, to ferret out erroneous or misplaced entries or to act on "legals" received in time but not yet processed. No one has argued that the Code should or does deprive them of that opportunity. But it does not follow that a bank is free to act on new information (such as a customer stop-payment order) once the check has apparently been retired. By this view, any bank might properly establish a systematic verification procedure at the end of all normal handling; this step would be a part of its process of posting, but the process would terminate once the verification was completed according to the bank's schedule. Certainly it is not lunatic to so read §4-109(e).[33] Certainly the draftsmen, had they

28. Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code,* 62 COLUM. L. REV. 992, 1003 (1962). Cf. J. CLARKE, H. BAILEY & R. YOUNG, BANK DEPOSITS AND COLLECTIONS 177 (1963).

29. Leary, *Check Handling Under Article Four of the Uniform Commercial Code,* 49 MARQ. L. J. 331, 360 (1965).

30. *Id.*

31. *Id.* at 359 n. 102.

32. 155 N.W.2d at 592 (Wisc. 1968) 4 UCC Rep. Serv. at 1007.

33. One commentator has paraphrased §4-109(e) as equivalent to "correct-in records." 2 ANDERSON'S UNIFORM COMMERCIAL CODE 8 (Supp. 1967).

consciously intended to equate completion of posting to expiration of the midnight or clearing house deadline, could have selected more precise language. Indeed the thought occurs that the interpretation urged by Leary and adopted by the *West Side* case renders §4-213 (1)(c) and the opening language of §4-303(1)(d) meaningless, since the outer limit of posting is then effectively delineated in the following subsections dealing with passage of deadlines.

The present status of §4-109, then, is this: it was adopted without ballyhoo, to clarify existing Code terminology; in defining "process of posting" it permits the banks to determine the steps involved; it contains language allowing the bank to include as a step "correcting or reversing an entry or erroneous action;" the only court which has construed it definitively[34] has taken a position highly favorable to the banks by holding that the period for reversing entries does not expire until the appropriate clearing house deadline expires. To assess its impact, some closer scrutiny of the *West Side* case is called for.

III. The West Side Rationale

The Wisconsin Supreme Court decision was grounded on several specific sub-holdings. The court first addressed the presenting bank's (West Side's) argument that §4-109 "permits only the correction of an error or the reversal of erroneous action," and held to the contrary that "only by the most strained interpretation"[35] could it be said that the entry must have been made in error. It allowed as how a "persuasive argument for West Side's position" had been made in a student law review note,[36] but preferred to quote and follow the interpretation of Mr. Leary, discussed above. The most the court would concede was that if its interpretation of §4-109 "fails to comport with the intent of the framers of the Code, there must be a resort to legislative clarification."[37]

Secondly, the court turned to the question whether clearing house rules allowing delayed return of items supersede the process-of-posting rule of the Code. The Milwaukee Clearing House Association had adopted the following rule concerning the return of checks:

> All items deemed presented through the clearing house which shall be found to be unacceptable, shall be returned in accordance with the Bank Collection Code . . . , except that unacceptable items may be returned through the exchanges on the second business day following the date they shall be deemed presented at the exchanges . . . , enclosed in an envelope provided by the Association

34. The reference of course is to *West Side.* Another Code case is cited by the Wisconsin court as favoring its position: Gibbs v. Gerberich, 1 Ohio App. 2d 93, 203 N.E.2d 851, 2 UCC Rep. Ser. 369 (1964). The case is distinguishable on its facts (the question was the timeliness of a restraining order), and in addition §4-109 had not even been adopted in the Ohio version of the Code.

35. 155 N.W.2d at 591, 4 UCC Rep. Ser. at 1007.

36. Note, 38 IND. L. J. 710, 717 (1963).

37. 155 N.W.2d at 592, 4 UCC Rep. Ser. at 1008.

and properly marked with the name of the bank to which it is being returned.[38]

The clearing house by-law had not been changed to reflect adoption of the Code in Wisconsin. Defendant Marine National argued that even if it were accountable under §4-213, the effect of the clearing house rule was to supersede that provision. The court agreed, citing (1) the 1952 argument of Dean Andrews (discussed above) that such a rule itself embodied a decision by the bank not to pay until the return period expired; (2) its impression that "the Code may be waived or altered by agreement";[39] and (3) the policy consideration that "because of the tremendous volume of checks being handled, . . . the payor bank needs a grace period following the computer phase to make the determination to pay or not to pay."[40] Each of these is vulnerable on its own, and the conglomerate holding creates more problems than it answers.

The clearing house by-law does indeed permit return of items two days after presentment. But it does not purport to define the payor bank's liability, or accountability, on the item. That the rule is a housekeeping rule, and not one containing substantive legal implications, is clear from the balance of the "delayed return" sentence which requires that such items be "enclosed in an envelope provided by the Association and properly marked with the name of the bank to which it is being returned." And again it is worth mentioning that the purpose of deferred posting rules and statutes was not to manifest a decision to pay, but to fix an extended *maximum* time for the physical return of items, lest banks be caught shorthanded and unable to process items the same day they were received. The Code's deferred posting provisions quite expressly limit the privilege of delayed return to situations where the bank has not already made final payment. §4-301(1) says that the bank may "revoke the settlement and recover any payment if *before it has made final payment* . . . and before its midnight deadline . . . it returns the item . . . ." (Emphasis added.) Comment 5 to that section explains: "Obviously the section allowing delayed returns assumes that the item has not been 'finally paid' under Section 4-213(1). If it has been, this section has no operation."

Nor does the Code so flatly authorize agreements which displace its provisions. §4-103(1) states that "the *effect of* provisions of this Article may be varied by agreement . . ." (Emphasis added.) This does not say that parties can rewrite explicit provisions of the Code as they see fit. While clearing house rules have the effect of agreements, under §4-103(2), even though not specifically assented to by all interested parties, all any agreement can alter is the *effect* of Code provisions. Does that permit waiver of the statutory deadline?[41] The answer should

38. Milwaukee Clearing House Association, By-law IV, Section 3.
39. 155 N.W.2d at 594, UCC Rep. Ser. at 1010.
40. 155 N.W.2d at 595, 4 UCC Rep. Ser. at 1012.
41. Dean Andrews asked precisely the same question with respect to the model deferred posting statute which also allowed for variation of its "effect" by agreement. Andrews, *supra* note 21, at 172 n. 66. He did not attempt an answer.

be NO, for otherwise the banks by self-serving clearing house rules could postpone and defer the return of checks indefinitely as convenience dictated. In our context here, under the holding of *West Side,* any party affected by a check—drawer, indorser, collecting bank, or creditor—would be absolutely at the mercy of whatever return deadline the payor bank happened to adopt locally. This is an unwarranted overextension of Code policy favoring freedom of contract, especially in the check collection setting where the midnight deadline has traditionally been an outside limitation. Further, if a collecting bank presents a check directly (as by mail), and takes in settlement an authorization to charge an account of the payor, it can hardly be said that payment is determined by a clearing house rule to which the presenting bank does not subscribe and which it may be intentionally trying to avoid by sending the item direct.

The court also relied on the huge volume of checks to be handled to justify a grace period for the banks. Here the court again deferred to Mr. Leary who had written that rules to govern check collections "should not be so restrictive as to clog the free flow and smooth handling of the almost unanimous number of good checks, collections in bulk, and deferred posting."[42] The court does not specify how its rule promotes a free flow, nor how a different rule would clog it. Moreover, accepting Mr. Leary's estimation that only about one-eighth of one percent of all checks are returned, this means there are upwards of 21,000,000 returned checks per year. This seems a sufficient number of potential legal controversies to deserve extremely careful consideration. And it was noted above that non-payment of a check is a matter of concern not only for the payor whose funds are at stake, but also for every other party to the check whose legal posture depends on what happens, and when, in the payor bank.

The asserted advantage of the holding is that it offers an "easy and simple certainty of time uncomplicated by bookkeeping mechanics or subjective intentions."[43] This looks to be true. Any party dealing with the payor seemingly would know that posting would be complete only when the deadline applicable to a given check expired, whereas it is unlikely that the same party could have any inkling when, within a two-day period, a more restrictively defined posting process was finished. The fallacy is that parties other than the payor and presenting bank may be totally unaware of the *applicability* of the clearing house rule, unless they are advised of the time and manner of presentment used for that check. Even if the drawer, for example, is familiar with the rule, he has no way of knowing when the deadline will expire for any given check issued by him, since he has no control over how or when the payee-holder initiates collection. Thus the goal of certainty of time is realizable only for the banks who have dealt with a given check and who are privy to the local clearing rules.

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42. Leary, *supra* note 29, at 334.
43. Trial court opinion, 4 UCC Rep. Ser. at 272.

Additionally, in support of *West Side,* the argument may be made that basing bank liability on the precise location of a given check in the posting processes of the bank will require the bank to begin time-stamping individual checks upon receipt and periodically throughout the process—otherwise it will be extremely difficult to trace the check to figure out whether it is too far along to be reversed. Such a contention defies proof or disproof, and disdains a common sense approach. First, it is not certain that all banks would feel compelled to adopt "disruptive" or "expensive" precautionary measures if "process-of-posting" were legally deemed completed at some point prior to expiration of deadlines. Small-volume banks might well be content to rely on established internal posting schedules to ascertain with reasonable certainty to what stage an item had progressed. Larger banks—or any bank processing checks by computer—might relatively easily program a time-stamping stage into their computer runs. And of course the *West Side* rule itself requires extra handling, for the bank which elects to honor a late stop-order or other "legal" must then reverse the item through the computer and return it to the clearing house. Secondly, checks presented through a clearing house are presented in batches, sorted into batches, and processed in batches. Checks are also handled by shifts of employees, oftentimes working round the clock. Location of checks within a batch or within a handling-stage should provide sufficient identification for purposes of stop-orders, attachments, set-offs and notices. Ultimately, too, it is just bad policy to justify a legal rule on the ease of proof of its operative facts, or to eschew an otherwise proper rule because of difficulty of proof.

IV. A Further Problem

Aside from its uncertain policy basis, and its questionable rationale, the *West Side* holding leaves another most problematical question unanswered. That issue, alluded to by the trial court[44] but ignored by the Supreme Court of Wisconsin, is what standards shall govern the payor bank's conduct in that period after it has debited the drawer's account but before time for reversing entries expires. Consider the facts of the case itself: Marine National Exchange Bank, the drawee, had originally passed the check through all normal processing, including a determination that there were sufficient funds in the drawer's account. It then received notice that a check given in exchange by the payee and deposited by Marine's customer, the drawer, was being returned uncollectable. Marine thereupon notified the drawer to this effect, and the latter stopped payment on the principal check.

At this stage, Marine quite clearly had made a sufficient preliminary decision to pay, and could have resisted the stop-order as untimely

44. The trial judge noted, 4 UCC Rep. Ser. at 273: "The possibility has been suggested that a payor bank may make a discretionary determination of payment in the period occurring between charging an account and reversing an entry when one of the 'four legals' intervenes. The exercise of that discretion may offer an equally sticky problem that fortunately is not here present . . . ."

under §4-303(1)(d). Its self-interest dictated otherwise. It therefore elected—though it was not obliged—to follow its customer's stop-order, and return the check. If we concede that Marine was not yet "accountable" to West Side, by what right did it prefer its customer over West Side? If Marine was not accountable to West Side under §4-213(1), might it be held liable on another theory? There are several possibilities.

Section 4-303 says that an untimely stop-order or other "legal" comes too late to suspend the bank's "right or duty" to pay the item. Marine argued in its brief,[45] again echoing Leary,[46] that the only duty the bank owes is to its customer. Certainly this is true with respect to the payor's obligation as drawee of the individual check. But the bank is also at this point in possession of valuable commercial paper belonging to the presenting bank or check owner, and seems clearly subject to the general obligation of good faith attached by §1-203 to "every contract or duty within this Act." If, therefore, the bank elects to honor a stop-order or to accede to an attachment which has no binding effect, and refuses to pay a check which is in all other respects properly payable, the bank arguably has acted in bad faith.[47] Such a theory of responsibility seems generally consistent with the idea (implicit in §4-303(1)(d)) that a check holder has greater "equities" in an account than one asserting an untimely "legal" claim to it.

A stronger case against the payor might be made on a tort theory. Regretably the Code imposes on the drawee no clear duty of care to the presenting bank or holder. §4-202 states that a "collecting bank must use ordinary care . . . ," but the payor is not a collecting bank. §4-103(1) forbids a bank to disclaim "responsibility for its own . . . failure to exercise ordinary care"—but this presumes the bank owed such care initially. On the other hand, the Code does recognize that a payor may be liable in tort (specifically, in conversion under §3-419) to the check owner; moreover, §4-103(5) conveniently sets out a measure of damages for "failure to exercise ordinary care in handling an item," which appears equally applicable to a payor. And §1-103 ordains that "unless displaced by the particular provisions of this Act, . . . the principles of law and equity . . . shall supplement its provisions." These provisions together suggest that a bank, having in its possession a check and confronted with a "legal" which is untimely under §4-303(1)(d), ought to be required to exercise at least ordinary care in deciding what to do with it. If, as apparently occurred in *West Side,* the payor returns a check for no reason but to favor its customer, where there is no contention that an overdraft would result and where there are no defects in the check itself, the bank arguably has not exercised ordinary care.

45. Brief for Respondent at 22, *West Side,* 155 N.W.2d 587, 4 UCC Rep. Ser. 1003 (1968).

46. Leary, *supra* note 29, at 364-65.

47. *Cf.* Akron Scrap Iron Co. v. Guardian Savings & Trust Co., 120 Ohio St. 120, 165 N.E. 715 (1929) (Plaintiff alleged fraud by payor; allegation ignored in the appellate court).

A clearer case for payor liability on this theory would exist if the bank turned over the account to an attaching creditor of the drawer; here even the justification of customer relations is missing, and the bank is acting as a simple volunteer.

Variations in the facts obviously might produce different results. If the "legal" is notice of insolvency, for example, due care might dictate withholding of the funds for the benefit of general creditors. A showing by the customer that the check had been stolen by the holder would militate toward honoring a stop-order.[48] Something resembling contributory negligence might be set up by the payor against the presenting bank on appropriate facts.[49] Although ordinary care might lead the payor to refuse payment in certain cases (as on a prompt showing by the drawer that he had been defrauded or that the check was being presented in breach of trust), even if the bank paid such an item improperly it would apparently obtain a measure of protection by subrogation under §4-407.

What remains constant here is the thought that, if the Code creates a hiatus between the timeliness of "legals" and accountability to the presenting bank, some workable standard of conduct ought to guide the bank's discretion during the period. The suggested standard is that the bank be required to exercise ordinary care to determine the relative peril to itself, the legal claimant (customer, creditor, etc.), and the check owner. So long as it responds in a reasonable manner to the best information available, its action should not be challengeable. The preferable alternative still would be an interpretation of the "process of posting" language in the Code which would have it completed as soon as possible. The net result—quicker "accountability"—would then be consistent with general Code policies favoring prompt retirement of checks and would make payment-by-check even more like payment-in-cash.

Conclusion

Thus far this discussion has sought to question the soundness of the *West Side* holding, to point out dangers inherent in it, and to propose an approach for dealing with payor conduct during the grace period created by the holding. Whatever one's view of the case, certain fundamentals do seem incontrovertible. Check collection has changed radically within even the last ten years, and promises to change even more radically in the future. Lawyers, bankers, legislators all will have to remain adaptable as technological and economic and legal barriers to progress fall.

In the narrow realm of payor conduct, the maximum time period for

48. Cf. UCC §3-603(1)(a).

49. Interestingly, the payor (Marine) made such an allegation in its answer in *West Side*, when it charged that had West Side acted promptly on notification given by Marine it could have avoided any loss. Brief for Respondent at A-Ap. 106-07.

"process of posting" is generally no more than forty-eight hours, and legal relationships may vary tremendously in that period. Passage of a few hours may be absolutely determinative of the bank's accountability, the liability of drawers and indorsers, the rights of collecting banks, and indirectly, the rights of creditors, decedents' representatives, trustees in insolvency, and others. Permeating all is a question first of the *rights* of the bank—can it rightfully set-off here, obey a stop-order there; then, from a broader policy point of view, what is at stake is the efficiency of the check collection system. A legal rule which has the effect of compelling banks to take elaborate precautions to protect themselves from liability may be undesirable, but its converse may be equally or more undesirable if it enables the banks, in their unfettered discretion, to allocate risks, burdens and losses among the parties. A rule such as *West Side's* is dangerous for several reasons: premised as it is on concern for bank efficiency, it fails adequately to consider the repercussions of such efficiency; it also is premised on the present capabilities of computerized processing, while those capabilities are daily being increased, refined, and sophisticated.[50] Is it unlikely, for example, that in the near future the *entire* handling of incoming checks will be done by computer, within hours—or minutes? Or is it unlikely that shortly the many billions of pieces of rectangular paper we call checks will themselves be outmoded, and that bank transfers will be effected totally by electronic impulse triggered by something resembling a credit card?[51]

If this is the future, the premium would seem clearly to be on *earlier* payment and *earlier* freedom from "legals." The entire construct of electronic transfer of credits could be stymied by dogged insistence on a grace period wherein the whole transaction hung suspended in air and banks alone could exercise discretion to finalize a transfer or not.

50. *See* Proceedings, American Bankers Association, National Automation Conference 1966 (1967).

51. *See* Clarke, *Check-out Time for Checks*, 21 BUS. LAW. 931, 936-38 (1966); Dunne, *Variation on a Theme by Parkinson or Some Proposals for the Uniform Commercial Code and the Checkless Society*, 75 YALE L.J. 788 (1966); Proceedings, *supra* note 50, at 172-77, 267-74, 323-27.